SOCIETY OF CHARTERED SURVEYORS IRELAND

A guide to insolvency for Property and Facilities Managers

Information Paper

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Insolvency Procedures in Ireland

The main remedies for creditors prevailing in Ireland are governed by four typical appointments comprising:

- **Receivership**
- **Voluntary Liquidation**
- **Official or Court Liquidation**
- **Examination**

There are nuances within each appointment which may change the emphasis of the appointment but usually not the nature. For example solvent companies in need of winding up are usually done so by means of a Members Voluntary Liquidation, a procedure whereby the creditors are paid in full! Increasingly, Banks are appointing “Fixed Charge Receivers” or Asset Receivers over specific assets (usually properties) in order to effect a sale or secure rents. As a result of the recent NAMA legislation, NAMA has the power to appoint “Statutory Receivers” who have wide ranging powers including powers of compulsory purchase.

Receivership

A Receiver is usually (but not always) appointed by a Bank over a Company or a specific asset on foot of a mortgage or a debenture document (fixed and floating charge). A Receivership usually comes about when a Bank has exhausted all means in dealing with a borrower who is in default of a loan for which the Bank has security over by way of certain assets of the borrower. The appointment takes place after the Bank makes a formal demand for repayment of the loan within a fixed time frame (usually 24 hours) and the demand is not met by the borrower.

The primary role of a Receiver is to take charge of the business or asset and maximise the final outcome for the appointing institution usually by one of the following methods:

- **Continuing the trade of the business and finding a buyer;**
- **Closing it down and selling the assets;**
- **Or simply securing the rents from a property.**

There are other responsibilities set out in legislation and Statements of Insolvency Practice issued by the Institute of Chartered Accountants but a Receiver’s overriding responsibility is to the appointing institute and their assets.

The powers of a receiver are set out in the debenture or charge document which is created when the loan facilities are granted to the borrower. A Receiver will be aware of the type of charge under which he/she is appointed and will usually have sought legal advice concerning his/her powers set out in the charge document to avoid a situation where he/she may be acting outside his/her powers and therefore illegally. In the case of Companies, Receivers are usually appointed under fixed and floating charges and they are usually appointed over all of the Company's assets. In this case the fixed element of the charge usually refers to a specific Company asset such as the Company's premises or a piece of machinery while the floating charge relates to the assets of the Company which are usually in flux such as cash, debtors and stock.

Fixed Charge Receivers (Asset Receivers)

A Receiver appointed under a fixed charge can pass the proceeds of sale of the asset (minus costs of sale and receiver's fees) directly back to the Bank or appointing institution without having to worry about preferential creditors.

Fixed Charge receiverships are increasingly common and are usually over property assets that are not wrapped in corporate structures. A typical example is a Residential or Commercial Investment Portfolio that is owned by a personal borrower and not a Company. The Receiver appointed will have no power over any floating assets such as cash or stock and will have no responsibility to preferential creditors (i.e. Revenue). Any outstanding commercial rates relating to a property are nearly always paid before or after the sale of the property as the liability attaches to the property and the purchaser will insist that these are discharged before he or she takes ownership of the property. The same is the case concerning outstanding NPPR charges with regard to residential properties.

Fixed and Floating Charge Receivers

Fixed and Floating charge receiverships are most common in the case of Companies. It is standard for the Bank to take a charge over the Company's fixed assets (e.g its factory premises or a specific machine used in production) in addition to the Bank taking a charge over the Company's floating assets (e.g. cash, debtors and stock). This facilitates the Bank/ Receiver in taking charge of and running the Company in order to maximise the result for the charge holder.

Following appointment the receiver will deal with the fixed charge assets in the same manner as outlined above however in the case of the floating charge assets the Receiver must pay Preferential Creditors in full before he can distribute any surplus funds back to the Charge Holder. In the unusual event that the Preferential Creditors and the Floating Charge holder are paid in full the next creditors to receive a dividend are the unsecured creditors or trade creditors.

When a Receiver is appointed over a Company he must advertise the appointment in at least one daily newspaper and the Government publication Iris Oifigiúil, there are no notification requirements when appointed over personal assets.

Liquidations

Liquidations are more onerous enforcement options and consist of two main types, a Creditors Voluntary Liquidation and a Court/Official Liquidation. A Liquidator's powers are not governed by a Charge Document instead they are set out in Part VI of the Companies Acts 1963 and 1990 together with Part V of the Company Law Enforcement Act 2001. A Liquidation essentially brings about the end of a Company that is insolvent. As the name suggests Voluntary Liquidations are just that, i.e. the Shareholders and Directors of a Company agree that it is in the best interests of the Creditors of the Company to cease trading and call a creditors meeting in order to pass a resolution to appoint a Liquidator and wind up the Company. A Court Liquidation arises when a creditor or the Directors of the Company make a Petition to the High Court for the winding up and appointment of an Official Liquidator. This is often used by Revenue to wind up Companies that repeatedly fall into arrears for payment of taxes.

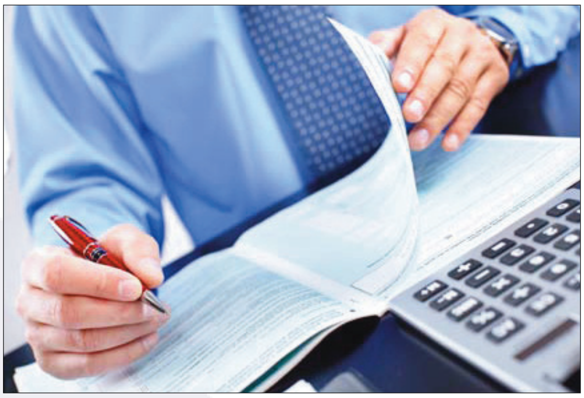
Creditors Voluntary Liquidation

A Creditors Voluntary Liquidation is a process where a Liquidator is appointed to an insolvent Company following meetings of its Members and Creditors. The creditors must begiven 10 days written and advertised notice of the meeting and can vote in person or by proxy.
The Liquidator's primary role is to:

- **Take possession of all the Company's assets and arrange for the sale of those assets;**
- **Draft a list and prove the claims of all the Creditors of the Company;**
- **Facilitate employee claims for Statutory Redundancy, Minimum Notice and arrears of Holiday Pay;**
- **Pay the Company's creditors in strict order (i.e Fixed Charge holder, Preferential Creditors, Floating Charge holder and unsecured creditors);**
- **Draft a report to the ODCE on the conduct of the Directors of the Company preceding the winding up;**
- **If necessary apply to the High Court for the restriction or disqualification of some or all of the Company's Directors as a result of their conduct of the Company's affairs;**
- **Eventually arrange for the Company to be dissolved.**

The Liquidator's main responsibility is to the Creditors of the Company and the Liquidator is obliged to report to the creditors on the progress of the Liquidation. Usually when a Liquidator is appointed and a Bank or other institution holds security over certain assets of the Company, the Bank opts to appoint a Receiver to those assets and arrange for their sale. This ensures the Bank has their appointee looking after their asset. In the event the Bank does not opt to appoint a Receiver the Liquidator will arrange for the sale of the assets and then forward the proceeds of sale (less costs) to the Fixed Charge holder.

Court / Official Liquidation



A Court Liquidation occurs after a creditor or the Directors of a Company petition the High Court for the winding up and appointment of an Official Liquidator. The Liquidation of the Company is then closely monitored by the Court and Court Examiner's office. The process of Court Liquidation is much the same as described above however the Liquidator is an agent of the High Court and must report regularly to the Court and Examiner's office. The Liquidator communicates with the Court through the Examiner's office, his appointed barrister and by written Official Liquidator's reports.

An important difference between Creditors Voluntary Liquidation and Court Liquidations is that there is no requirement to hold a creditors meeting giving ten days statutory notice. This is important in circumstances where there is a risk that the business or its assets are at risk of being substantially devalued due to the issuing of notices to creditors and / or cessation of the Company's trade during the ten day notice period before holding a creditors meeting.

Creditors who petition the High Court for the winding up of a Company must demonstrate that they have valid reason to do so. The Court has strict criteria for such applications. The Court can make creditors liable for the costs of such a petition which can be substantial. In any event creditors will only receive a dividend after a Liquidator has realised the assets and there is no guarantee that surplus funds will be available to the creditors of the Company.

Examinership

An Examinership is initiated by an application to the High Court for protection from creditor claims and the appointment of an Examiner by:

- **A creditor; or**
- **Shareholders holding 10% or more of the equity; or**
- **The Company; or**
- **The directors.**

This is done by means of a petition and affidavit, accompanied by an Independent Accountant's Report. Companies making an application for Court protection must demonstrate that the Company has a viable business and a reasonable prospect of survival and this must be backed up by an Independent Accountant's Report.

The main legislation governing the process is set out in the Companies Amendment Act 1990. The Examiner, who is normally an accountant specialising in this work, is nominated by the applicant but is appointed by the Court to whom he is answerable. He is and must be seen to act in an independent manner.

Once appointed, within the time scale set out in the legislation (maximum of 100 days), the Examiner reviews the business prospects and the past activities of the company. He focuses particularly on the future viability of the company and seeks in conjunction with the Directors and any new investors identified to him, to develop a Scheme of Arrangement to deal with the existing claims of the creditors and the rights of the current shareholders.

Control and Management of the company and the business remains with the Board. The Examiner, save in exceptional circumstances, takes no active role in Management.

During the period of Court protection creditors, who are entitled to oppose the initial application to Court for the protection order, may not seek to recover their existing debts or goods supplied subject to retention of title, and no receiver or liquidator can be appointed.

Where a company is unable to meet its debts and new investors inject fresh funds, control normally passes from the existing shareholders. In those circumstances, in common with other comparable cases, the scheme normally provides for the elimination of the rights of the existing shareholders.

Unlike a liquidation or receivership the assets remain in the company after the Examinership. The new share capital would control the business and have all the normal shareholder rights. An added benefit is that the existing contractual relationships, which might be terminated by liquidation, can be preserved.

Recent Appointments to Note

- Appointment of Receiver to Muckross Park Hotel and subsequent application by the Company for Court Protection and the appointment of an Examiner.
- Examinerships of Eircom, Monsoon Accessorise, Sunday Business Post, Smart Telecom, Fallon & Byrne
- Appointment of Receiverand subsequent sale of A/Wear Ltd
- Appointmentof Receiver over the Group Companies behind the Examiner newspaper in Co. Cork
- Appointment of Receiver over the Anglo HQ building
- Appointment of Receiver to Laragan Developments Ltd and Carrickmines Green
- Appointment of Receiver to Sunday Tribune
- Appointment of special Liquidator to IBRC

The SCSI wish to thank McStay Luby for their assistance in the preparation of this guide.

Dating back to 1895, the Society of Chartered Surveyors Ireland is the independent professional body for Chartered Surveyors working and practicing in Ireland.

Working in **partnership with RICS**, the pre-eminent Chartered professional body for the **construction, land** and **property** sectors around the world, the Society and RICS act in the public interest: setting and maintaining the **highest standards of competence and integrity** among the profession; and providing **impartial, authoritative** advice on key issues for business, society and governments worldwide.

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